ORAL ARGUMENT NOT YET SCHEDULED

No. 21-7078

In the United States Court of Appeals for the District of Columbia Circuit

STATE OF NEW YORK, *et al.*,

Plaintiffs-Appellants,

v.

META PLATFORMS, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia, No. 20-cv-3589 (Hon. James E. Boasberg)

BRIEF OF J. GREGORY SIDAK AND DAVID J. TEECE AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. ***Parties and Amici.*** All parties and *amici* appearing before the district court and in this Court are listed in the Brief for Defendant-Appellee.

2. ***Rulings Under Review.*** References to the rulings at issue appear in the Brief for Defendant-Appellee.

3. ***Related Cases.*** A list of related cases appears in the Brief for Defendant-Appellee.

CIRCUIT RULE 29 CERTIFICATE

No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to fund the preparation or submission of this brief. The parties each have filed letters with the Court consenting to the filing of all *amicus* briefs.

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INTEREST OF THE *AMICI CURIAE*

Amici are scholars in law and economics who have researched and taught on antitrust law and the economics of industrial organization. They share a professional interest in ensuring that antitrust law develops in a manner consistent with sound economic principles, particularly in the context of dynamic industries where innovation is critical to competition. They previously have filed *amicus* briefs in cases that raise such issues. *See, e.g.*, Br. of *Amicus Curiae* J. Gregory Sidak, *Sanofi-Aventis U.S., LLC v. Mylan, Inc.*, No. 21-3005 (10th Cir. Sept. 22, 2021); Br. of *Amici Curiae* 37 Economists, Antitrust Scholars, and Former Government Antitrust Officials, *United States v. AT&T, Inc.*, No. 18-5214 (D.C. Cir. Sept. 26, 2018); Br. of *Amici Curiae* Antitrust Law & Economics Scholars, *Ohio v. Am. Express Co.*, No. 16-1454 (U.S. Jan. 23, 2017); Br. of *Amici Curiae* Professors and Scholars in Law and Economics, *Pacific Bell Tel. Co. v. linkLine Commc'ns, Inc.*, No. 07-512 (U.S. Sept. 3, 2008).

J. Gregory Sidak is the chairman of Criterion Economics, which he founded in 1999. He has testified as an expert economic witness in complex business disputes throughout the world, and he twice served as Judge Richard Posner's court-appointed neutral economic expert.

Mr. Sidak co-founded the *Journal of Competition Law & Economics*, published by the Oxford University Press. He has held the Ronald Coase Professorship of Law and Economics at Tilburg University in the Netherlands and the F.K. Weyerhaeuser Chair in Law and Economics at the American Enterprise Institute for Public Policy Research. He has been a senior lecturer at the Yale School of Management and a visiting professor at Georgetown University Law Center. Mr. Sidak was Judge Posner's first law clerk, served on the senior staff of the Council of Economic Advisers in the Executive Office of the President, and was deputy general counsel of the Federal Communications Commission. He has published six books and approximately 150 scholarly articles, primarily on antitrust, telecommunications regulation, and intellectual property. The Supreme Court, this Court, and many other courts and regulatory bodies have cited his writings approvingly. He received A.B. and A.M. degrees in economics and a J.D. from Stanford University.

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Group, a global expert services and consulting firm. Professor Teece is an expert on industrial organization, technological change, and innovation, particularly as it relates to antitrust and competition policy and intellectual property. He has authored over 30 books and 200 scholarly papers and is co-editor of the *Palgrave Encyclopedia of Strategic Management* and *Industrial & Corporate Change.* The Supreme Court and many other courts and regulatory bodies have cited his writings approvingly. He received his B.A. and Master of Commerce (with first-class honors) from the University of Canterbury and his Ph.D. in economics from the Wharton School of the University of Pennsylvania.

This case concerns whether Facebook[1] violated Section 2 of the Sherman Act by declining to permit applications that competed with Facebook's own product to use its platform. In *amici*'s view, the district court correctly concluded that Facebook's conduct is not anticompetitive. Antitrust law generally imposes no obligation on companies to deal with rivals because such a requirement would decrease innovation and harm consumers – contrary to the main goals of antitrust law. *Amici* submit

[1] Because the events at issue took place before Facebook, Inc. changed its name to Meta Platforms, Inc., this brief refers to the company as Facebook.

this brief to provide the Court with their unique perspective as antitrust economists on the questions in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about whether Facebook violated the antitrust laws when it made changes to its social-network business as that business grew in the early 2010s. Before that time, Facebook allowed third-party developers to build applications for its platform with relatively few restrictions.[2] But then, according to the complaint, Facebook realized that developers were building applications that undercut Facebook's business, by creating applications that mimicked Facebook's core features or that diverted users to rival social networks. So Facebook decided to restrict applications from accessing its platform to do those things. Plaintiffs say this is anticompetitive – that Facebook had to continue allowing others to build applications on its platform that would hurt Facebook's business. That is wrong. Under Plaintiffs' view, the antitrust laws would discourage the innovation essential to advancing consumer welfare. And the order that Plaintiffs seek is fundamentally unworkable.

[2] Because this case comes to the Court on a motion to dismiss, this brief takes all of the allegations in the complaint as true.

First, Plaintiffs argue that Facebook should be required to deal with its rivals. But any rule forcing companies to do business with their rivals would substantially discourage innovation. Companies develop new products and services in the hope that they will reap economic benefits – benefits that could disappear if successful companies are required to share the benefits with their competitors. Less financial incentive to innovate means less innovation, which ultimately will harm consumers because they will be offered fewer products and services. Antitrust law is supposed to encourage innovation, not punish those companies that innovate.

Second, Plaintiffs argue that Facebook violated the Sherman Act because it changed its business model, by modifying what it allowed third-party applications to do on its platform. But companies are allowed to change their business models over time; something that once worked may no longer make sense as the products and the market change. A contrary rule would penalize companies that experiment in how they commercialize new products or services. Facebook's experience bears this out. According to the complaint, it was only after Facebook created and opened its platform that it realized that allowing third-party developers to use its platform in certain ways ultimately would hurt Facebook's business by diverting users away from Facebook. So Facebook changed its policies to prohibit developers from using the platform to build applications that replicated Facebook's core features or to funnel Facebook data to rival platforms. If a company could be held liable for changing its products once it gains experience on how those products operate in the real world, that would substantially discourage innovation.

Third, Plaintiffs argue that even if each of Facebook's practices was not anticompetitive, they somehow become anticompetitive in combination. The Supreme Court already has rejected that argument, explaining that if a company engages in two lawful business practices, the combination of the two practices does not become unlawful. And there is good reason for that rule. It is difficult enough for a business to assess whether a court is likely to find a new practice to be anticompetitive; it would be virtually impossible for the business to make that determination for every combination of new and existing practices. At the very least, that approach would substantially raise compliance costs and legal fees. The result, again, would be to deter experimentation and to harm consumers.

Finally, courts should proceed cautiously in deeming novel conduct anticompetitive, and should be particularly wary of imposing remedies that would require courts to micromanage companies' business operations. Economists often have found that conduct that sometimes initially seems anticompetitive ultimately is pro-competitive, particularly when it comes to new technologies and services. Further, if a practice actually is anticompetitive, the market often can correct any abuses. So it is better for courts to take a cautious approach to deeming novel conduct anticompetitive and in imposing remedies. Besides, Plaintiffs' proposed remedy would enmesh the judiciary in the technical details of Facebook's dealings with a wide range of competitors, even though Facebook's products will change, its competitors will shift, and its business needs will evolve. A district court should not become the central planner of Facebook's business.

This Court should affirm the decision of the district court.

ARGUMENT

THE CONDUCT AT ISSUE IS NOT ANTICOMPETITIVE

Facebook is a social-networking platform on which users connect and share content with other users. In 2007, Facebook opened up its platform to allow third-party developers to build applications that would operate on Facebook's platform. For example, developers created games for Facebook's platform in which users could compete with other users.

At issue in this case are two changes Facebook made to limit what applications built by third-party developers could do on its platform. First, Facebook adopted a policy of not allowing third-party applications to access its platform to divert users to competing social platforms. JA 93 (Compl. ¶ 199). Second, Facebook adopted a policy of not allowing third-party applications to access its platform to replicate core functions of Facebook. *Id.* (Compl. ¶ 201). Plaintiffs claim that Facebook made those changes to stop third-party applications from driving users away from Facebook. Facebook did not prohibit third-party developers from building applications for Facebook's platform or prohibit the developers from developing applications for other platforms. Nonetheless, Plaintiffs assert that Facebook's changes were anticompetitive. They are wrong.

A. Facebook Is Not Required To Share Its Innovations With Competitors

Plaintiffs' principal argument is that Facebook acted anticompetitively when it changed its policies to prevent third-party developers from building applications for Facebook's platform that drive traffic to rivals, because the changes reduced competition among social platforms. That is wrong as a legal matter, because companies generally owe no duties to deal with their rivals. *See Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 443-44 (2009); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-09 (2004). And it does not make sense as an economic matter. Accepting Plaintiffs' legal rule would harm consumers by discouraging companies with innovative ideas from investing in those new ideas in the first place.

The central aim of federal antitrust law is to advance consumer welfare. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 319 (1962). One key way that the antitrust laws do that is by encouraging innovation. *United States v. Microsoft Corp.*, 147 F.3d 935, 948 (D.C. Cir. 1998) ("[A]ny dampening of technological innovation would be at cross-purposes with antitrust law."). This concept is not new. More than eight decades ago, the economist Joseph Schumpeter explained that radical gains in consumer welfare come from new or innovative products; minor improvements result only in marginal welfare gains. *See* J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 J. Competition L. & Econ. 581, 602 (2009) (citing Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (Harper & Bros. 1942)).

Innovation is particularly important in the technology sector. Many technology industries do not function as described in Econ 101, with firms selling undifferentiated products at marginal cost in perfect competition. Instead, companies in these markets often compete by investing in new technology *for* a market, not *in* a market – using technology and innovation to jump over competitors to displace them. *See* Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. Chi. L. Rev. 1, 14-15 (2001). For example, IBM's dominance in 1960s mainframe computers was not replaced by a company making better or cheaper mainframe computers, but rather by an entirely new product, the personal computer. *Id.* at 14. Similarly, Microsoft's dominance in the personal computing space was eroded not by competitors offering superior personal computers and operating systems, but by competitors offering new products like smartphones and open-source software, products that reimagined both markets. *Cf.* Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. Competition L. & Econ. 153, 182 (2010).

Because investment drives innovation, antitrust economics has focused on how to encourage investment in new products. Investing in a new product is costly because the innovator firm must bear all of the costs involved in creating and marketing the new product, including vital research and development. It also is risky, because there is no guarantee of success. In contrast, once the innovator firm has proven that a market for the new product exists, the costs and risks of entry are much lower for rivals, which can simply follow the innovator's lead. *See* David J. Teece, *Profiting From Technological Innovation: Implications for Integration, Collaboration, Licensing and Public Policy*, 15 Res. Pol'y 285, 290-91 (1986). Accordingly, a fundamental principle of antitrust economics is that each market entrant should bear its own costs of entry. *See* Richard A. Posner, *Antitrust Law: An Economic Perspective* 59 (Univ. of Chicago Press 1976). That minimizes free riding and ensures that innovators retain a financial incentive to innovate.

Plaintiffs' proposed rule, under which companies would be forced to share their innovations with their rivals, would directly undermine the incentives to innovate. Companies would be significantly less likely to invest in new products if rivals could just wait until the innovator is successful, and then use the antitrust laws to force the innovator to share the fruits of their investments. The result would be a reduction in innovation, which ultimately would reduce the products and services available to consumers.

Although Facebook's platform has become incredibly successful, its creation involved substantial risk and expense. Facebook made significant investments to create a platform attractive to third-party developers and to billions of end users. It created not only the platform itself, but also tools for developers to build applications on the platform – tools for which Facebook did not charge. The antitrust laws should permit Facebook to benefit financially from its risk-taking and innovation, rather than requiring Facebook to share those rewards with competitors.

B. Companies Do Not Harm Competition By Changing From One Lawful Business Practice To Another

Plaintiffs also argue that Facebook violated the Sherman Act by changing its business model. According to the complaint, Facebook at first allowed third-party applications to access its platform to replicate Facebook's core functions and to divert users to competing platforms; then, Facebook changed course and restricted those uses of the platform. JA 93-95. Plaintiffs do not argue that either the original business model or the revised business model is itself unlawful. Rather, they argue that the *change* from one model to the other is unlawful. Pls. Br. 66-67; *see also* Br. of Am. Antitrust Institute 14-18.

Plaintiffs are wrong on the law. The antitrust laws do not require companies that initially choose to deal with rivals to continue doing so. *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986) (Posner, J.) ("If a monopolist does extend a helping hand, though not required to do so, and later withdraws it as happened in this case, does he incur antitrust liability? We think not."). Instead, the antitrust laws have long recognized that businesses have the right to choose who they deal with, and to change who they deal with as circumstances change. *See, e.g.*, *Reveal Chat HoldCo LLC v. Meta Platforms, Inc.*, No. 21-15863, 2022 WL 595696, at *2 (9th Cir. Feb. 28, 2022) (citing cases).

Plaintiffs' change-theory of antitrust law also runs counter to basic economic principles. Experimenting with different business models goes hand in hand with innovating new products. *See* David J. Teece, *Business Models, Business Strategy and Innovation*, 43 Long Range Planning 172, 176-79 (2010) (describing the historical link between business model innovation and new products). For every new product that a company introduces, the company must develop a business model that provides consumers with enough benefits to justify adopting the new product, while also ensuring that the company obtains a sufficient return on its investment. *See* David J. Teece, *Business Models and Dynamic Capabilities*, 51 Long Range Planning 40, 45 (2018) (Teece, *Dynamic Capabilities*). If the company cannot find such a model, then there will be no business case to produce the new product. *See* David J. Teece & Greg Linden, *Business Models, Value Capture, and the Digital Enterprise*, 6 J. Org. Design 1, 1 (2017).

Companies must be able to experiment with different business models because they may not get it right on the first try. Instead, companies learn from experience, "fine-tun[ing] – and sometimes completely overhaul[ing] – [business models] before they can become profit engines." Teece, *Dynamic Capabilities*, *supra*, at 42. A company that introduces a new product thus needs to be able to experiment with different business models to determine which best fits with the new product. *Id.* at 45 ("It takes time for business model innovation to catch up to technological possibilities, perhaps because business models are more context-dependent than technology."). Accordingly, economists have long argued against forcing a company to deal with its rivals because it limits a company's ability to choose among competing strategies. *See, e.g.*, Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972, 973 (1986).

Plaintiffs' approach would severely hinder this necessary experimentation. If prior lawful business models are used as evidence that later models are unlawful, that would discourage experimentation. And if firms cannot experiment with how to commercialize their innovations, they simply will invest less in innovation. Plaintiffs' approach would discourage investment in radical innovations aimed at creating entire new markets or product categories, because companies would not have experience with those markets or products to develop the right business models without experimentation. Yet those are the innovations that are most likely to significantly advance consumer welfare. *See* Sidak & Teece, *supra*, at 602.

Plaintiffs' approach also would deter companies from doing business with rivals. Plaintiffs claim that Facebook violated the antitrust laws by restricting applications from accessing its platform to divert users onto competing platforms after having first allowed that conduct. If Facebook is penalized for switching its platform from being more open to being less open, then the next company like Facebook that launches a new product will be reluctant to start with a more open business model. Instead, the prospect of antitrust liability will drive innovators to initially choose more closed models that exclude competitors, and to adopt more open models only when they are sure there will be no negative impacts to their businesses. So the ultimate consequence of adopting Plaintiffs' theory would be to discourage, rather than encourage, firms to deal with their competitors.

C. Legal Business Practices Do Not Become Illegal In Combination

Plaintiffs and their *amici* fault the district court for evaluating the legality of each of Facebook's practices individually, arguing instead that they should be evaluated "as a whole" or as a "course of conduct." Pls. Br. 57-58; Br. of Acemoglu *et al.* 25-26. The Supreme Court has rejected this argument, explaining that "[t]wo wrong claims do not make one that is right." *Pac. Bell Tel. Co.*, 555 U.S. at 457. The Court explained if a company that has no obligation to deal with a rival chooses to do business with the rival in two different ways, both of which are lawful, the rival cannot bring an antitrust claim because the combination of the two practices allegedly hurt the rival's profit margins. *Id.* at 452. The Court explained that because a company does not have a duty to deal with a rival in general, it "certainly" does not have a duty to deal with the rival in the manner the rival would prefer. *Id.*

But even if this Court were writing on a blank slate, it should reject Plaintiffs' rule. Adopting Plaintiffs' rule would massively increase litigation uncertainty, which ultimately would discourage innovation. Companies generally assess the legal risk of their practices as they are developed. That process already is difficult and costly, especially when it comes to antitrust issues, because there may be little that separates lawful, pro-competitive conduct from anticompetitive conduct. *See* Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 Wash. & Lee L. Rev. 49, 86 (2007).

Plaintiffs' rule would only increase litigation uncertainty, because it would be amorphous and difficult to apply. Each company would need to assess every business innovation from 30,000 feet and decide whether, in totality, some new change will cause the company to violate the antitrust laws. That is a much more difficult than evaluating the lawfulness of a single practice. *See Pac. Bell Tel. Co.*, 555 U.S. at 453 (recognizing the heightened difficulty of assessing the lawfulness of "a moving target"); *see also* J. Gregory Sidak, *Debunking Predatory Innovation*, 83 Colum. L. Rev. 1121, 1142 (1983). Even if this task were possible, it would sharply increase compliance costs, and those costs would be passed along to consumers (assuming the company went ahead with the product).

The increased difficulty of assessing compliance risk under Plaintiffs' approach would lead to less innovation. *See* J. Gregory Sidak, *Monopoly, Innovation and Due Process:* FTC v. Qualcomm *and the Imperative to Destroy*, 6 Criterion J. on Innovation 1, 737-40 (2020) (critiquing the vagueness of a "totality of the circumstances" approach to antitrust liability). It is impossible to separate product innovation (and the benefits it delivers to consumers) from innovation in business practices, because companies launching new products often must also develop the business models needed to make those products viable. *See* pp. 13-15, *supra*. A rule that makes it more costly to determine whether a new business practice is lawful would only serve to discourage experimentation in business practices, which in turn would discourage innovation. The Court should not go down that path. Instead, economic principles counsel a more straightforward approach: If business practices are legal in isolation, then they should be legal in combination.

D. Courts Should Proceed With Caution Before Ordering Companies To Do Business With Their Rivals

This Court should proceed with caution before ordering Facebook to deal with its rivals because such a rule could significantly deter innovation and harm consumers. The Court also should be reluctant to endorse the broad remedial order that Plaintiffs seek.

1. Economists Often Have Difficulty Determining Whether New Business Practices Are Anticompetitive

Economists have long recognized the difficulty in accurately determining whether new conduct is anticompetitive. In particular, they have found that conduct that initially appears to be anticompetitive often turns out to be pro-competitive. As Nobel laureate Ronald Coase explained in the 1970s, "if an economist finds something – a business practice of one sort or another – that he does not understand, he looks for a monopoly explanation." Ronald H. Coase, *Industrial Organization: A Proposal for Research*, *in* 3 Economic Research: Retrospect and Prospect: Policy Issues and Research Opportunities in Industrial Organization 59, 67-68 (Victor R. Fuchs ed., Nat'l Bur. Econ. Res. 1972).

That bias continues today. More recent research confirms that antitrust economists often initially misclassify new practices as anticompetitive. *See, e.g.*, Manne & Wright, *supra*, at 165 ("[T]he critical point is that antitrust scrutiny of innovation and innovative business practices is likely to be biased in the direction of assigning higher likelihood that a given practice is anticompetitive than the subsequent literature and evidence will ultimately suggest that it is reasonable or accurate."); Rachel S. Tennis & Alexander Baier Schwab, *Business Model Innovation and Antitrust Law*, 29 Yale J. on Reg. 307, 319 (2012) (explaining how "antitrust economists, and in turn lawyers and judges, tend to treat novel products or business practices as anticompetitive" and "are likely to decide cases wrongly in rapidly changing dynamic markets").

It is often only over time that economists come to understand the "competitive benefits in practices that once were thought uniformly pernicious." Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 10 (1984). For example, economists initially thought that "tying arrangements, boycotts, territorial allocations, and resale price maintenance" agreements always were anticompetitive. *Id.* Later research on the economic consequences of those practices showed that they can have competitive benefits. *Id.*; *see, e.g.*, *Pac. Bell Tel. Co.*, 555 U.S. at 452 n.3 (rejecting the view, long held by lower courts, that "price-squeez[ing]" is anticompetitive in light of "developments in economic theory"). Thus, even economists certain that they have found an anticompetitive practice may, after analyzing additional data, conclude they were mistaken.

As a result of this tendency, antitrust economists have long argued that courts should be hesitant to deem new practices to be anticompetitive. *See* Easterbrook, *Limits of Antitrust*, *supra*, at 14-17. One reason for this view is that markets can correct abuses by monopolies. *Id.* at 15-16 ("Other things equal, we should prefer the error of tolerating questionable conduct, which imposes losses over a part of the range of output, to the error of condemning beneficial conduct, which imposes losses over the whole range of output."). The negative consequences of outlawing pro-competitive conduct is one reason why courts insist that *plaintiffs* bear the initial burden of showing a practice is anticompetitive. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018); *FTC v. Qualcomm Inc.*, 969 F.3d 974, 991 (9th Cir. 2020). This Court should thus proceed cautiously in assessing whether Facebook's conduct here violates the Sherman Act.

2. Plaintiffs' Proposed Remedy Is Likely To Mire The Courts In Litigation Without Any Significant Economic Benefit

The Court should be particularly hesitant before endorsing the remedial order that Plaintiffs seek. Plaintiffs seek a broad order that would require Facebook to allow rivals to operate on Facebook's platform in ways that harm Facebook's own business. JA 113-14. If adopted, that order could mire the district court (and this Court) in years of disputes regarding Facebook's practices. For that reason, the Supreme Court has counseled that courts should not become "central planners," "a role for which they are ill-suited." *Trinko*, 540 U.S. at 408.

The judicially supervised break-up of the Bell telephone monopoly during the 1980s and 1990s demonstrates how difficult it is for courts to administer these far-reaching remedies. The consent decree that resolved that case involved a mix of divestitures and conduct remedies for each of the resulting companies. Shelanski & Sidak, *supra*, at 36. But the decree was not self-executing; instead, the resulting regional Bell operating companies needed permission "whenever they sought to enter new markets or offer new services." *Id.* The burden on the courts was tremendous: "The district court ultimately received over *nine hundred* waiver petitions that required it to rule on the meaning and scope of the decree's theoretically crisp line-of-business restrictions." *Id.* (emphasis added).

Administering the remedy that Plaintiffs seek similarly would mire the district court in a variety of technical business disputes. Like any technology company, Facebook constantly makes adjustments to its platform in light of new technical requirements and user preferences. That means that any judicial remedy focused on the facts of today will require constant modifications for the order's duration. The district court would need to address key questions about Facebook's business, such as: Which practices can Facebook prohibit on its platform? Can Facebook update its terms and conditions to account for new practices? And how should Facebook and the courts weigh the benefits of sharing user data against the privacy/security risks if rivals intend to use their platform access to transfer consumer data across different platforms? A federal court would not be well suited to make those decisions, even if it had the time.

Further, even with all that effort, there may be no ultimate benefit to consumers. Economics scholars have concluded that dynamic market conditions often defeat the purpose of an injunction, particularly when the market already will have changed by the time the injunction comes into effect. *See* J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and the Regulatory Contract: The Competitive Transformation of Network Industries in the United States* 56-57, 63 (Cambridge Univ. Press 1997); Shelanski & Sidak, *supra*, at 31-36. Even if the order does result in some pro-competitive benefits, the costs of administering the order may outweigh those benefits. *See* Easterbrook, *Limits of Antitrust*, *supra*, at 16. The order also is likely to reduce innovation and delay the introduction of new products. Sidak, *Debunking Predatory Innovation*, *supra*, at 1142. The result would be a net detriment to consumers.

Finally, entering Plaintiffs' proposed order may create perverse incentives for Facebook's competitors. Specifically, Facebook's competitors might find it more lucrative to invest in litigation related to administration of the court order – either to complicate Facebook's operations, or to expand their own access to Facebook's platform – rather than improving their own products and services. That also would result in a net loss to "consumer welfare," all while "rais[ing] administrative costs." Shelanski & Sidak, *supra*, at 35.

This is not to say that courts never should conclude that business practices violate the antitrust laws and never should issue orders that require close supervision. In the case of clear anticompetitive conduct that substantially harms consumers, the benefits of judicial intervention no doubt would outweigh the costs. But Plaintiffs' allegations here describe nothing more than a new, successful company, experimenting with its business model as it grows. That is not illegal; that is what robust competition needs.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

/s/ Nicole A. Saharsky

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March 28, 2022

CERTIFICATE REGARDING SEPARATE BRIEF

Pursuant to Circuit Rule 29(d), I certify that this separate *amicus* brief is necessary because it provides unique insights regarding antitrust economic principles from the perspective of antitrust economists. To my knowledge, no other *amicus* addresses the same arguments from the same perspective.

/s/ *Nicole A. Saharsky*
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Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,795 words, excluding the parts of the brief exempted by Rule 32(f) and Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirement of Rule 32(a)(6) because it was been prepared in a proportionately spaced typeface using Microsoft Word in Century Schoolbook 14-point type for text and footnotes.

/s/ *Nicole A. Saharsky*
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on March 28, 2022, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system, which will serve all counsel of record.

/s/ *Nicole A. Saharsky*
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